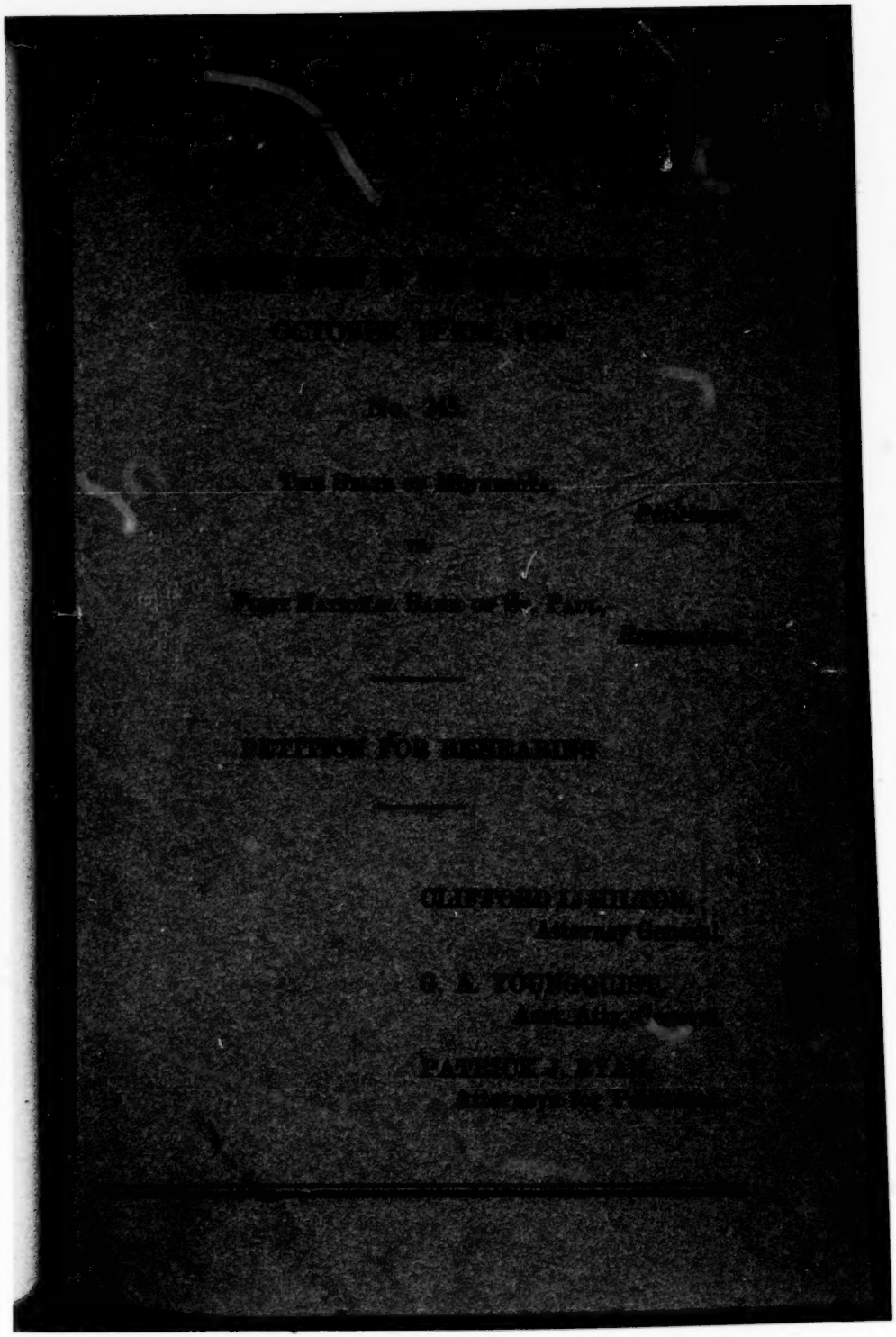

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 245.

THE STATE OF MINNESOTA,

Petitioner,

vs.

FIRST NATIONAL BANK OF ST. PAUL,

Respondent.

PETITION FOR REHEARING

Now comes the above named petitioner and respectfully petitions for a rehearing herein on the following grounds:

This Court has held that because in Minnesota all moneys and credits are taxed at a rate of three mills per annum on their value, and because mortgages are not taxed there, but in lieu thereof a registry or recording tax is collected at rates of 15c per hundred and 25c per hundred dollars of value, and because of the proof of the existence in 1921 and 1922 of a large aggregate of money and credits and mortgages in the hands of individuals, the taxes assessed on bank shares of respondent at 67 mills and 61½ mills of forty per cent of the value of shares are invalid under Sec. 5219, R. S. and under that section as amended in 1923. The proof was (passing for

the present evidence relating to investment houses) that individuals held large amounts of bonds which they had purchased with their surplus funds, that is, funds not used in the business in which they were engaged. (R161,162.) Aside from this there was no characterization of the nature of purchases of mortgages or other investments by those who bought them; but it safely may be assumed that all such purchases were made and held as investments in the ordinary significance of that term. The Court holds that such investments constitute moneyed capital coming into competition with national banks.

We undertook no discussion of this phase of the decision either on the oral argument or in the brief, because of the declaration of the Court in First National Bank of Guthrie Center vs. Anderson, 269 U. S. 341, 350, where, speaking of competing moneyed capital within the meaning of Sec. 5219, and within the meaning of that section, as amended, in 1923, it said:

> "It, of course, would exclude bonds, notes or other evidence of indebtedness when held merely as personal investments by individual citizens not engaged in the banking or investment business, for capital represented by this class of investments is not employed in substantial competition with the business of national banks. Thus in legal contemplation and practical effect the restriction was the same before re-enactment as after."

Taking this declaration to be the carefully considered judgment of the Court, we omitted to bring to the Court's attention the matters which we now briefly state.

The principal point of this petition is that the debates both in the House and Senate preceding the adoption of the amendment quite conclusively show that it was the Congressional

intent to declare that investments of individuals, other than private bankers, in bonds, notes and other credits should not be deemed moneyed capital within the meaning of that Section; and to declare that shares of national banks might be taxed by the states at a rate not higher than that imposed upon state banks or private bankers. And this, the speakers said, had always been the true meaning of Sec. 5219.

The discussion revolved around the decision of this Court in Merchants National Bank vs. Richmond, 256 U. S. 635. It was said that, if the decision in that case should be followed to the point of holding that bank shares might not be assessed at a higher rate than bonds and mortgages held by individuals for investment purposes, assessments against bank shares in numerous states, variously said to be between 18 and 27 states, would be invalid. The purpose of amending Sec. 5219, it was said, was to permit these states to continue their classified system of taxing money and credits and mortgages, and to continue their income tax laws, and to permit validation of taxes assessed against shares of national banks so long as those taxes were not at a higher rate than taxes upon state banks and private bankers. It was repeatedly said that before the Richmond Bank decision Sec. 5219 operated to prevent the taxation of shares at a higher rate than that imposed upon state banks and private bankers. Much of the discussion was devoted to the provision which, in one form or another in the different bills, sought to give the states power to validate taxes previously assessed or paid in the various states which were affected. There was difference of opinion between the House and Senate as to the form of the amendment, particularly as to the validating clause. And this difference of opinion grew out of the assertion that in New York and Massachusetts, private bankers, such as J. P. Morgan & Co., Kuhn, Loeb & Co., Lee Higginson & Co., Kidder Pea-

body & Co., were taxed at a lower rate than shareholders in national banks, and many were unwilling that taxes on bank shares should be validated unless those bankers were assessed on their capital at a rate equal to shares of national banks.

Cong. Rec., Senate Vol. 64, pp. 845, 850, 1454-1464, 2173-2175, 2218-2224; House Vol. 62, pp. 8720-8739; Vol. 64, pp. 1539-1546, 1659, 1660, 1841, 1842, 4780-4803.

The part of the amendment here pertinent as it stood in the Senate bill read as follows:

> "In the case of a state tax on said shares, the rate of taxation shall not be higher than the rate applicable to other moneyed capital employed in the business of banking." (C. R. Vol. 64, p. 2172.)

It passed the Senate reading:

> "In the case of a tax imposed by a state or any agency thereof on said shares, the rate of taxation shall not be higher than the rate applicable to other moneyed capital employed in the business of banking within the taxing state; Provided, that whenever by any taxing district the shares in mercantile, manufacturing, or business corporations doing business therein are taxed the rate applied by said taxing district to the shares in banking associations shall not exceed the average of the rates applied by it to the shares of such other corporations or to the shares of such of them as are taxed therein." (C. R. Vol. 64, p. 4959.)

The House bill which was under consideration was, as to the pertinent part, in the following language:

> "That the tax imposed shall not be at a greater rate than that assessed on other moneyed capital in the hands of individual citizens of such state coming into competition with business of national banks." (C. R. Vol. 62, p. 8720.)

The bills passed the House and Senate in the respective forms above stated. Conference committees were named but came to no formal agreement. Upon receipt of the report of the conference committee of the House, that body voted against concurring in the bill passed by the Senate, and thereupon an amendment was offered which apparently was the work of the conference committees and had been agreed upon as a compromise measure for adoption, in the event of the failure of the House to accept the Senate bill. This amendment was adopted in both house and Senate and became the law now under consideration. It was and is in the following form:

> "In the case of a tax on said shares, the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks; PROVIDED, That bonds, notes or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business, and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

Both in the House and Senate there was explanation of the purpose and meaning of the compromise amendment, particularly in respect of its variation from the original House and Senate proposals. In the House the principal statement was made by Mr. Wingo. He had served on the House Committee on Banks and Banking, and had taken an active part in the hearings before that Committee. He had taken a leading part in the debates on the floor of the house. And he was a member of the House conference committee. In the Senate the explanation was made by Senator Kellogg. Senator Kel-

logg had framed the Senate bill and was very active in procuring its passage. In both House and Senate the amendment was adopted immediately following these explanations and it cannot fairly be doubted that the statements made by Mr. Wingo and Senator Kellogg express the meaning of the amendment as it was in the minds of both House and Senate members at the time they made a law of it. It may be added that the views expressed in these explanations fairly reflect what was said by these same men and many others during the consideration of the original bills in both House and Senate. Mr. Wingo said, in part:

> "However, we all agree that in view of the uncertainty and the difference of opinion that has been created by this Richmond decision, it is wise to restate the law, but the House conferees feel that in our effort to remove the uncertainties thus created, we should not add other uncertainties and make the confusion worse confounded, which the Senate provision does. We take the position that it is easy to override the contention of the Richmond case by restating the old rule with such additional language as will show that it is the intention of Congress in the new statute to follow the rule laid down in the old line of decisions which were clearly understood and constituted a settled basis upon which the state taxing power could depend with some degree of certainty. In order to do this the House committee has added the two provisions which I last read, to the old settled rule. But you may ask, 'Will not these two new provisions create uncertainty until they are given judicial determination by the Courts?' We answer 'No' because we get the language of these two provisions from the language used by the courts in many decisions. Thus it will be seen that the House provision as insisted upon by the House conferees clearly overrules the Richmond decision and goes back to the old rule which the states followed for 53 years.

"Under the contention in the Richmond case, the tax of every state in the Union on national-bank stocks was in danger, if such state provided a lower rate on any intangible property, or if, for illustration, any state exempted farm mortgages from taxation. Such exemption of farm mortgages has been held by the old line of decisions as not violating the rule laid down in 5219, and by the proviso which the House conferees have put on subdivision (b) we make it clear that moneyed capital invested in farm mortgages, and which is exempt from taxation in many of the states, shall not be deemed moneyed capital within the meaning of the law.

"The position of the House conferees in this whole controversy has been to overcome the contention of the Richmond case by restating the law in clear, unequivocal language, yet using the old settled rule. We have at all times sought to give to the states an unlimited permission to exercise their taxing power on capital invested in national banks with one restriction only, and that is the simple, honest limitation that in the exercise of that taxing power the states shall not destroy the national banks by discriminating in favor of the capital of private bankers that compete with the national and state banks. The position of the House Conferees is: Let any state tax banking capital to any extent it wishes, just so it makes the burden equal on all banking capital." (C. R. Vol. 64, pp. 4802, 4803.)

Mr. Kellogg said, in part:

"That is the House provision. My object in introducing the original bill, which said that the rate should not be higher than that [on] all other moneyed capital engaged in banking, was to get away from the provisions of state laws that made the basis of taxing national banks the individual credits in the hands of the citizen. The House has attempted to get by that by providing that these investments in the hands of individuals shall not be deemed moneyed capital engaged in banking. I think

> myself it is rather a cumbersome provision; but we cannot get anything else, and I think it is better to accept it than to get no law at all." (C. R. Vol. 64, p. 4959.)

We recognize that ordinarily the meaning of an act of Congress is to be ascertained from the language of the act itself. But plainly where the meaning of words or phrases used is not free from doubt, the Congressional Record may be examined for such help as it may give. If controlling effect is to be given to the words "and representing merely personal investments not made in competition with such business," the whole proviso is nullified. The amendment, so interpreted, means nothing more than is fully expressed in the declaration "the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks." The careful reference to specified classes of capital, to-wit: "bonds, notes or other evidences of indebtedness" in the hands of individual citizens, its reference to capital, or to individuals "not employed or engaged in the banking or investment business," and the reference to "personal investments," are denied any meaning or significance whatever. Whereas it seems to us that the proviso was intended to control and limit the language which it followed. We submit that the debates demonstrate this. Furthermore, if we read the act in the light of its stated meaning as expressed in the debates and give to it a meaning which the language used is susceptible of, and which in common, if not grammatically correct, usage it fairly expresses, the clause "and representing merely personal investments not made in competition" etc., will be given the effect which in free speech it frequently has; that is "and representing" will mean "which represent." It will read:

> PROVIDED, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business, which represent merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

We submit that it is much more reasonable to say that Congress intended to declare that personal investments made outside the banking or investment business were not to be considered competing moneyed capital, than to say that it intended to declare that "personal investments not made in competition with such business" shall not be deemed moneyed capital "coming into competition with the business of national banks.

We submit that the debates and explanations above referred to justify the opinion in First National Bank vs. Guthrie Center in its declaration that the amendment merely amounted to restatement of the law as previously in force, but that then and now investments in bonds, notes and evidences of indebtedness were not to be deemed competitive with the business of national banks unless held or employed in the banking or investment business. And we may add that the term "investment business" if we are to accept the explanation of Messrs. Wingo and Kellogg and others is confined to that business as conducted by private bankers.

It is true, of course, that some of the statements of the Court in Mercantile National Bank vs. Mayor of New York, 121 U. S. 138, quoted in the opinion in this case, are against the theory that prior to 1923 personal investments were not under any circumstances to be deemed competing moneyed capital; but we point out that the decision in that case was that investments of insurance companies, in an amount in excess of the aggregate holdings of bonds and notes of all in-

dividuals and corporations in Minnesota, did not represent capital coming in competition with national banks. And it seems to us also that the Court in that case could not have thought of substantial competition in the sense of its being substantial if the aggregate of investments were great, or it would not have held that the competition between savings banks and national banks insubstantial, where it was shown that their deposits, assets available for investment purposes, were greatly in excess of the moneyed capital of all kinds held by all persons and corporations in Minnesota.

We have referred only to bonds, notes and the like held by persons not engaged in the banking or investment business. In our brief, and on the argument, we endeavored to point out that the evidence did not require or justify a finding that any substantial amount of capital was employed in any business of dealing in bonds, notes or other evidences of indebtedness. It is our thought that if the Court is lead by what we have said to doubt the correctness of the conclusion, that personal investments held in a large aggregate constitute competing moneyed capital within the meaning of Sec. 5219, it may be inclined to reconsider whether the showing in this respect requires an adherence to the decision filed. There were but two corporations located in Ramsey County which might be considered in the "investment business." One was the Investment Service Co., with authorized capital of $50,000. It was in the business of aiding persons in making investments. (R. 80.) The other was the Provident Loan Association, with authorized capital of $50,000. This was essentially a charitable institution. (R. 173, 174.) The Court inadvertently said in its opinion that two such corporations in Ramsey County had a capital aggregating $2,250,000. There were two corporations in Hennepin County, one having authorized capital of $1,200,000, (19) and the other having authorized capital

of $250,000. (190, 191.) But we submit that when we go outside the taxing district in which the bank is located, the competitive capital will only be considered substantial when the amount is great comparing it with bank shares, or bank resources, and with other capital held over the whole state, and that, so considered, the inadvertent failure adequately to tax two corporations with capital aggregating $1,450,000, since it could not even minutely affect the tax rate of the state, should not be considered so substantial as to require the exemption from taxation of the shareholders of 340 (1921) or 343 (1922) national banks. (Ex. M. 363, 364.)

And if consideration be confined to capital embarked in a business of dealing in investments, the facts stated in the opinion as tending to establish the existence of a substantial amount of moneyed capital will be almost wholly lacking in significance, because it may not be assumed that purchases of bonds and other investments in large amounts indicates the employment of substantial capital in the business of selling bonds and investments, further than as indicated, because when the facts are shown we anticipate it will be made to appear that, excepting the two Minneapolis corporations above referred to, this business was principally conducted in the state by persons and corporations located outside the State who employ no appreciable amount of capital in their business within the state.

We add a single practical consideration, which in our judgment might be forceful in suggesting a re-examination of the basis of the decision which has been rendered. Beyond doubt the underlying object and purpose of Sec. 5219 was to prevent discrimination against and injury to national banks. If in the operation of the money and credits tax law or the mortgage registry tax law, Minnesota national banks have been subjected to discrimination or threatened with injury, the

banks and their shareholders must have been conscious of it. If they are not aware of it, then the discrimination may not be said in any real or practical sense to be substantial. Of weight here is a fact of common knowledge in Minnesota that in 1925 there was under consideration in the State Legislature, a bill to increase the tax rate on money and credits from three to four mills, and it was stated in the newspapers that delegations representing the banking organizations of the state opposed the increase on the ground that it would tend to injure the banks by causing the withdrawal of deposits and might drive capital from the state. But more convincing and far more weighty is the fact that national banks throughout the state have continued to pay taxes assessed against them on the same basis as that involved in this proceeding. The respondent here, one other St. Paul bank and, as far as we can learn, four small banks, two of which were about to liquidate, elsewhere in the state resisted payment. The Supreme Court of Minnesota upheld the Bank's contention, filing its decision in 1925. Yet the banks, except as stated, continued to pay. When the decision of this Court in this case was announced, the Minnesota Legislature was in session and it began consideration of the measures to be taken to bring the laws of the state into conformity with Sec. 5219 as here interpreted. The officers of the national banks (other than the respondent) over the state, hurriedly met and petitioned the legislature to withhold action until its next session, pledging that during the intervening two years taxes assessed as heretofore would be paid without protest. And the banks in the short time they had for action, in number approximately 90 per cent of all in the State, have promised to pay such taxes and have given assurance that stockholders' meetings will be called promptly to ratify these pledges of their officers. We believe that these banks have so paid their

taxes and have so pledged continued payment during the next two years because they think that the money and credits tax law and the mortgage registry tax law are not harmful or hostile to national banks, and that, on the contrary, these tax laws and those taxing shares of national banks constitute a practical, fair and workable system of taxing moneyed capital and shares and that any change in the existing system will operate to the disadvantage of the banks.

REAL ESTATE MORTGAGES AS COMPETING CAPITAL

We thought that the opinion in First National Bank of Guthrie Centre vs. Anderson implied that if there were proof that mortgages which were alleged to be in competition with the business of national banks were negotiated through banks they would not come within the terms of Sec. 5219 Since the evidence here, so far as the subject was inquired into, showed this banking participation in the making of mortgages, we offered no discussion on the subject of whether the amendment to the Federal Reserve Act of 1913, permitting national banks to a limited extent to invest in mortgages, operated to bring mortgage investments within the operation of Sec. 5219.

We now call attention to the specific statement in Mr. Wingo's explanation of the amendment to the effect that its purpose was to declare that mortgages were not to be deemed moneyed capital coming into competition with national banks. We add that everything which we have said concerning personal investments is applicable to mortgages.

There are some observations which seem to us forceful which might have been made against the theory that Congress in permitting national banks to invest in mortgages intended

also to amend, in effect, Section 5219 so as to forbid the taxation of bank shares at a higher rate than that imposed on mortgages.

In 1913, Minnesota had its mortgage registry tax law, and we believe that many other states had substantially similar laws. The Minnesota Act imposes a registry tax, and specifically exempts the mortgage and the debt secured thereby from all further taxation. The tax is on "the security" and not on the mortgage or the debt. (Mut. Ben. Ins. Co. vs. Martin, 104 Minn. 179, 182.) There could be no tax on bank shares comparable with the mortgage registry tax. And since the state had expressly provided that upon payment of the registry tax the mortgage and the debt should thereafter be free from all taxes, and since mortgages usually run for three to five years, and frequently run for ten to twenty year periods, immediately on the passage of the amendment to the Federal Reserve Bank Act the Minnesota laws taxing bank shares were wholly invalidated, and, if the theory be pressed to its extremity, no taxes could be assessed on bank shares for some period varying from three to twenty years thereafter. And this same condition, we believe, existed in many states. It is not easy to attribute any such intent to the amendment.

It is more logical, we believe, to suppose that Congress was aware of the decisions of this Court holding that mortgages might be exempted from taxation without exempting bank shares. (Hepburn vs. School Directors, 90 U. S. 480; Adams vs. Mayor of Nashville, 95 U. S. 19; First Nat. Bank of Aberdeen vs. Chehalis County, 169 U. S. 440, 460.) This Court had not in any of those decisions declared that mortgages were not to be regarded as competing moneyed capital because national banks were forbidden to loan money on real estate security. The decisions rested solely on the consideration that

the exemption of mortgages from taxation did not evince a policy discriminating against national banks, and were not investments of the character which must be taxed at as high a rate as bank shares.

It is far more likely that Congress was in 1913 initiating the policy, which in 1916 it elaborately carried into effect, of making capital available for mortgage loans, particularly for farm loans, at the cheapest possible rate. In the Federal Land Bank Act, the Joint Stock Land Bank Act, and the allied enactments, (U. S. C., Title 12, Sec. 641—1021) Congress undertook to throw almost unlimited amounts of capital into this field, and to a large degree it sought the aid of private capital by permitting private acquisition of shares in these institutions. It seems to us that Congress could not have intended that no state should aid in such a policy by exempting mortgages from taxation unless it also exempted shares of national banks from taxation.

Respectfully submitted,

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